FORM NLRB-4477
(2-85)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Omaha, Nebraska

MBC CONSTRUCTION COMPANY, INC.

Employer

and

Case No. 17-RC-12414

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 571

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9*(c)* of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3*(b)* of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. 1/

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9*(c)(1)* and Section 2*(6)* and *(7)* of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9*(b)* of the Act: 2/

All full-time and regular part-time journeyman and apprentice operating engineers and shop employees including working foremen employed by the Employer from its facility located at 3108 South 67th Avenue, Omaha, Nebraska, but EXCLUDING supervisors, confidential employees, office clerical employees, truck drivers, guards and supervisors as defined in the Act, and all other employees.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit*(s)* found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are:

- Those employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision (the payroll cutoff date), including employees who did not work during that period because they were ill, on vacation, or temporarily laid off; and
- Those employees in the unit who were employed for 30 days or more within the 12 month period preceding the payroll cutoff date, and employees in the unit who had some employment during that 12 month period and who were employed for at least 45 days within the 24 months immediately preceding the payroll cutoff date.

Employees who have been terminated for cause or who have quit voluntarily shall not be eligible to vote under any eligibility criteria.

Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 571

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. **Excelsior Underwear, Inc**., 156 NLRB 1236 *(1966)*; **N.L.R.B.** v. **Wyman-Gordon Company**, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, two copies of an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned/Officer-in-Charge of the Subregion who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office,8600 Farley Street - Suite 100, Overland Park, Kansas 66212-4677 on or before March 20, 2006. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by March 27, 2006.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with the Board in Washington, D.C. If a party wishes to file one of these documents electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board web site: www.nlrb.gov.

Date March 13, 2006

at Overland Park, Kansas

/s/ D. Michael McConnell

Regional Director, Region 17

1/ The parties stipulated that the Employer is a Nebraska corporation, is engaged in commerce with the meaning of the National Labor Relations Act and is subject to the jurisdiction of the National Labor Relations Board. The Employer is engaged in the construction industry and provides heavy highway construction services, including concrete paving and sewer construction services, from its facility located at 3108 South 67th Street, Omaha, Nebraska. In the course of its business operations the Employer annually purchases and receives at its facility goods and services valued in excess of $50,000 directly from sources located outside the State of Nebraska.

2/

ISSUES:

The Petitioner seeks an election in the bargaining unit described above, with the exception that the Petitioner asserts that the inclusion of "all full-time and regular part-time employees" in the unit description is in conflict with the eligibility formula set forth in *Daniel Construction Co.,* 133 NLRB 264 (1961) modified 167 NLRB 1078 (1967), and *Steiny & Co.,* 308 NLRB 1323 (1992), and is inappropriate in the instant bargaining unit. Secondly, the Petitioner asserts that pursuant to the Board decisions in *Steiny* and *Signet Testing Laboratories,* 330 NLRB 104 (2000), and the policy set forth in OM Memorandum 01-24 (12/29/00), the construction eligibility formula set forth in *Daniel Construction* and *Steiny* must be used herein. More specifically, the Petitioner contends that the OM Memorandum eliminated the exception for seasonal employers such as the employer in *Dick Kelchner Excavating Co.,* 236 NLRB 1414 (1978) set forth in footnote 16 in *Steiny.* Further, the Petitioner contends that the Employer's business is not seasonal, because the Employer employs a substantial complement of employees in the requested bargaining unit throughout the year. The Petitioner also asserts that even if the Employer's business is seasonal, the Employer's operation will be fully staffed by mid-March or early April, so that it would be appropriate to hold an election even if the Employer is deemed to be a seasonal employer. Finally, the Petitioner contended at hearing that Kyle Morrissey must be excluded from the bargaining unit based on the fact that he is the son of Michael Morrissey, a 26% owner-manager of the Employer, and the grandson of

Bernard Morrissey, a 48% owner-manager of the Employer, and that Kyle lacks a sufficient community of interest with other unit employees to be included in the bargaining unit under the tests set forth in *NLRB v. Action Automotive, Inc*., 469 U.S. 490, 105 S.Ct. 984, 83 L. Ed. 2d 986 (1985), *Parisoff Drive-In Market, Inc*., 201 NLRB 813 (1973), and *R & D Trucking, Inc*., 327 NLRB 531 (1999). On brief, the Petitioner also contends that Kyle's brother, Paul Morrissey, should also be excluded from the bargaining unit for the same reasons.

The Employer is in agreement with the petitioned-for bargaining unit, with the exception that the Employer contends that the use of the standard "full-time and regular part-time employees" in the unit description is appropriate herein. The Employer contends that it operates on a seasonal basis in a manner virtually identical to the employer in *Dick Kelchner Excavating Co.,* supra, and therefore the exception set forth in footnote 16 of *Steiny* is met, and it is not appropriate to apply the *Steiny* eligibility formula in this case. The Employer contends that its full operations will resume by mid-March or early April, and therefore it will appropriate to hold an election in April because a representative number of unit employees will be employed in the unit. Finally, the Employer contends that Kyle Morrissey should be included in the bargaining unit because his father is not a majority owner of the Employer; Kyle enjoys no special privileges because of his familial relationship; and because Board case law, including *New Silver Palace Restaurant*, 334 NLRB 290 (2001), *Blue Star Ready-Mix Concrete Corporation*, 305 NLRB 429 (1991), and *St. Louis Auto Parts Co.*, 315 NLRB 717 (1994), support a finding that Kyle shares a community of interest with other unit employees and is appropriately included in the bargaining unit. The issue regarding the inclusion of Paul Morrissey in the bargaining unit was not raised at the hearing and the Employer did not raise the issue in its brief.

DECISION:

For the reasons discussed in detail below, I conclude that the inclusion of the standard "full-time and regular part-time" language in the bargaining unit description is appropriate in the instant case; that the use of the standard *Steiny* eligibility formula used for employers in the construction industry is appropriate herein; and that Kyle

and Paul Morrissey shall be excluded from the bargaining unit because their interests are sufficiently aligned with the Employer's owners and managers that they lack a community of interest with other bargaining unit employees.

FACTS:

The Employer is a heavy highway construction contractor engaged in cement paving and sewer work from a single facility located in Omaha, Nebraska. The parties stipulated that the Employer is engaged in the construction industry. The Employer is owned by three individuals who hold the following corporate titles and percentages of ownership interests: President, Bernard Morrissey, 48%; Vice-President, Michael Morrissey, 26%, and Vice-President, Harry Chalen, 26%. Bernard Morrissey is the father of Michael Morrissey, and the grandfather of Kyle and Paul Morrissey. There is no evidence that Chalen is related to the Morrisseys. All three corporate owners are active in the day-to-day management of the Employer. In addition to the three owners, the Employer's management staff includes Paving Supervisor David Pospisil.

The Employer employs a total of approximately 42-45 employees during its construction season, which runs from approximately mid-March or early-April to mid-December. Included in the total number of employees are approximately 11-12 operating engineers, 23 laborers, 5 cement masons and several office clerical employees. Since the Employer's creation in 1970, the Employer and the Petitioner have been parties to successive collective bargaining agreements covering the Employer's operating engineers, including a current agreement effective May 4, 2004 through April 30, 2006. There is no evidence that the Petitioner has established a Section 9(a) bargaining relationship with the Employer, and the parties stipulated that the current collective-bargaining agreement does not constitute a bar to the election. The current collective bargaining agreement includes an exclusive hiring or referral hall. The current agreement also provides for the inclusion of working foremen in the bargaining unit, but permits the Employer to hire working foremen directly.

The Employer's operating engineers work on crews engaged in sewer construction and paving projects. The sewer construction work crews include operating engineers and laborers, and are directly supervised by Michael Morrissey. Working foreman Paul Morrissey also works with the sewer crews, and on occasion fills in for Michael Morrissey in directing the work of the sewer crews. No party asserts that Paul Morrissey is a supervisor within the meaning of Section 2(11) of the Act. Paving Supervisor David Pospisal is responsible for the day-to-day supervision of the Employer's paving crews, which consist of operating engineers, laborers, and cement masons.

The Employer performs construction work as weather permits from mid-March or early April through mid-December of each year. During the period from mid-December until the start of the construction season the following spring, the Employer retains a number of operating engineers to service and overhaul its construction equipment. Operating engineers who are not needed to perform service and overhaul work are laid-off at the end of the construction season. Although the Employer's peak production month is in July, the Employer hires a full employee complement of approximately 11-12 operating engineers at the beginning of the construction season in the spring and maintains a generally stable employee complement throughout the construction season. At the time of the hearing herein, on February 28, 2006, the Employer employed five operating engineers, all of whom were then engaged in service and overhaul work. At the onset of the construction season in the spring, the Employer typically directly recalls its operating engineers who were laid-off at the end of the prior construction season, without contacting the Petitioner's referral hall. The record shows that for the past several years most of the operating engineers laid-off by the Employer at the end of the construction season in December have returned to work for the Employer the following spring. In the event that the Employer does not obtain a full complement of operating engineers by extending offers of recall to laid-off employees, the Employer contacts the Union for a referral from the Union's referral hall.

"FULL-TIME AND REGULAR PART-TIME" LANGUAGE APPROPRIATE:

The Petitioner argues that the *Steiny* eligibility formula, which provides voting eligibility to employees who were employed for at least 30 days in the 12-month period preceding the eligibility date, and to employees who had some employment in the unit during that 12-month period and were employed for at least 45 days within the 24 months immediately proceeding the eligibility date for the election, is not compatible with the use of the standard "full-time and regular part-time" language in the unit description. In support of its contention, the Petitioner cites *Davison-Paxton Company,* 185 NLRB 21 (1970) and the eligibility formula used in that case for contingent or extra employees. Moreover, the Petitioner asserts that the collective bargaining history herein establishes that the disputed language has not been used in the unit description. The Petitioner further asserts that the use of an exclusive hiring hall or referral system is inconsistent with use of the phrase "full-time and regular part-time" in the unit description.

In considering the Petitioner's contentions, I initially note that the disputed language is routinely used in describing construction industry bargaining units. The inclusion of all "full-time and regular part-time" employees in the unit description is separate and distinct from the voter eligibility standards set forth in *Steiny* and *Davison-Paxton Company*. The parties' successive collective bargaining agreements do not contain express unit descriptions. The Petitioner has not produced any evidence that the inclusion of the disputed standard language in the unit description herein would constrict or change the scope of the bargaining unit covered by the parties' current collective bargaining agreement. Moreover, the record evidence establishes that although the Employer generally employs full-time employees, the Employer has employed some employees on a part-time basis. I find that there is no basis to depart from the standard practice of including language in the unit description that expressly describes the bargaining unit as including "all full-time and regular part-time" employees.

STEINY FORMULA APPROPRIATE:

As asserted by the Employer, its operations appear similar to the operations of the employer in *Dick Kelchner Excavating*, supra, wherein the employees worked on a seasonal basis, and there was no evidence that a substantial number of employees worked for several different employers during the year or that their employment was intermittent during the construction season. However, I conclude that the use of the standard construction industry eligibility test set forth in *Daniel Construction* and *Steiny* is appropriate herein. Although the Employer cites footnote 16 of *Steiny* for authority that the *Steiny* formula should not be used when the employer operates on a seasonal basis, the Employer cites no post-*Steiny* Board cases in which the *Steiny* formula has not been used because an employer's operations were deemed sufficiently seasonal to constitute an exception to *Steiny*. I note that most construction work is, by its nature, seasonal to some extent. The Board has employed a special eligibility formula in the construction industry for over 40 years, and continues to do so because it has proven to be an effective, efficient, and familiar means of determining voter eligibility. See *Steiny* , at page 1326. The Board in *Steiny* at page 1327 stated that the *Steiny* eligibility formula is applicable in " … all construction industry elections. We find no reasonable, feasible, or practical means by which to distinguish among construction industry employers in deciding whether a formula should be applied." In *Steiny*, at page 1328, the Board decided to apply the formula regardless of the construction employer's method of operation. In *Signet Testing Laboratories, Inc*., 330 NLRB 1 (1999) the Board held that the *Steiny* formula applies to all employees in the construction industry unless the parties stipulate not to use the *Steiny* eligibility formula. Further, OM Memo 01-24 appears to support the Petitioner's assertion that absent agreement by the parties, the *Steiny* eligibility formula is used in construction industry elections. The Employer acknowledges that holding an April election herein is appropriate as the Employer will be fully staffed at that time. Further it appears that a substantial complement of operating engineers are currently employed by the Employer performing service work; that all operating engineers who were laid-off at the end of the construction season last December will be offered recall; and that historically most of the Employer's laid-off operating engineers accept recall at the

beginning of the next construction season. Accordingly, it does not appear that the Employer has established that the application of the *Steiny* formula is inappropriate herein, and I therefore will apply the standard *Steiny* eligibility formula in this case.

KYLE MORRISSEY AND PAUL MORRISSEY LACK SUFFICIENT COMMUNITY OF INTEREST WITH OTHER UNIT EMPLOYEES:

Kyle Morrissey works for the Employer as a journeyman operating engineer running a backhoe roller on sewer construction crews. Kyle is the grandson of Bernard Morrissey, the Employer's President and 48% shareholder; and the son of Michael Morrissey, a Vice-President of the Employer and 26% shareholder. There is no evidence that Kyle Morrissey has any relationship with Harry J. Chalen who holds the remaining 26% ownership interest in the Employer. Kyle's immediate supervisor is his father, Michael Morrissey.

Kyle is almost 21 years old and has worked for the Employer for about four years. Kyle is not a student, does not receive financial support from his father or his grandfather, and has lived independently from his father for almost two years. There is no evidence that Kyle ever lived with his grandfather. Kyle receives the same wages and benefits, works the same hours, and works under the same conditions as unit employees. In fact, Kyle is a current member of the Petitioner and his membership dues are deducted from his paycheck pursuant to the check-off provisions of the current collective bargaining agreement. Kyle's brother Paul Morrissey, who is approximately 22-23 years old, is a working foreman on sewer construction crews and directs the work of the sewer crews when his father Michael Morrissey is unable to do so. Kyle and Paul's brother Adam Morrissey, 22 years old, works for the Employer as a laborer. No party seeks the inclusion of Adam in the bargaining unit of operating engineers.

The Petitioner asserts that Kyle has received special benefits because he has not been through the Petitioner's apprenticeship program, but works as a journeyman operator for the Employer. The Petitioner further asserts that the Petitioner's referral hall does

not generally refer individuals who have not participated in the Petitioner's apprenticeship program. However, there is no evidence that Kyle is not fully qualified to work as a journeyman operating engineer. There is no other evidence that Kyle receives express special benefits because of his familial relationship with the Employer's corporate owners.

Section 2(3) of the Act excludes "any individual employed by his parent or spouse" from the term "employee". When the parent or spouse owns less than a 50-percent interest in a corporation the Board examines whether the close relative of an owner or shareholder enjoys special status or receives benefits or privileges not accorded other employees. However, even if a relative receives no special job-related benefits, a relative may still be excluded under a "community of interest test" if it is established that the interests of the employee/relative are more closely aligned with management than with bargaining unit employees. See *NLRB v. Action Automotive*, 469 U.S. 490, 494-95 (1985). In *Parisoff Drive-In Market, Inc*., 201 NLRB 813 (1973) the Board relied on *NLRB v. Caravelle Wood Products, Inc*., 466 F. 2d 675 (7th Cir., 1972) remanded 200 NLRB 855 (1972), enfd 504 F. 2d. 1181 (7th Cir. 1974), rehearing den. 510 F.2d 257 (7th Cir. 1974) for a community of interest test in deciding whether an employee's familial ties were sufficient to align his interests with management and warrant his exclusion from the bargaining unit. The test considers the following factors: 1) the percentage of stock held by the parent or spouse; 2) the relationship of the stockholders to each other; 3) whether the shareholders are actively engaged in management or hold supervisory positions; 4) the number of relatives employed compared to the total number of employees; and 5) whether the relative lives in the same household or is partially dependent upon the stockholder. In cases where the employee is related to more than one owner-manager, the interests of the related owner-managers are cumulated for the purpose of application of the test. See *Palagonia Bakery Company, Inc*., 339 NLRB 515, 536 (2003), *T.K. Harvin & Sons, Inc*. 316 NLRB 510, 533 (1995); *Futuramik Industries, Inc*., 279 NLRB 185, 185-86 (1986); *Ellis Funeral Homes, Inc*., 255 NLRB 891, 891-92 (1981); *Fisher Stove*

Works, 235 NLRB 1032, 1043 (1978); *Marvin Witherow Trucking*, 229 NLRB 412 (1977).

In applying the above stated community of interest test to the facts herein, Kyle's father and grandfather own a combined 74% of the Employer; both Kyle's father and grandfather are actively involved in the management of the Employer and Kyle is directly supervised by his father; in addition, Kyle's brother Paul is a working foreman on sewer construction crews and sometimes fills in for Kyle's father, Michael Morrissey, in directing the work of the sewer crews; and the bargaining unit of operating engineers consists of about 10-11 employees, exclusive of Kyle and Paul, so that a relatively high number of relatives of corporate owners are employed, as compared to the total number of bargaining unit employees. However, Kyle does not live in the same household as his father or grandfather and does not appear to be financially dependent upon either his father or grandfather.

The Employer asserts that in order to exclude an individual whose parent or other relative is a non-majority corporate shareholder under the community of interest considerations articulated in *Action Automotive*, supra, there must be a showing that the employee lives in the same household as the non-majority corporate shareholder. However, relatives of non-majority corporate shareholders have been excluded from the bargaining unit on the basis of community of interest considerations even when they do not live with the non-majority shareholder. See *T.K. Harvin & Sons, Inc.*, 316 NLRB 510 (1995), *Ellis Funeral Homes, Inc.*, 255 NLRB 891 (1981), *Marvin Witherow Trucking*, 229 NLRB 412 (1977). Further, the cases cited by the Employer to support of its assertion that Kyle Morrissey should be included in the unit appear distinguishable from the facts herein. *St. Louis Auto Parts Co.*, 315 NLRB 717, 721 (1994), involved an unfair labor practice proceeding wherein the Administrative Law Judge found that an employee whose mother owned one share of corporate stock and whose grandfather owned 16,000-17,000 shares was properly considered an employee for purposes of considering the employee's signature on an employee petition the employer relied upon for establishing its reasonable doubt of the union's majority

status. In addition to the very small percentage of corporate stock owned by the employee's mother in *St. Louis Auto Parts Co*, there was no showing that the employee was supervised by his relatives, or that his interests were otherwise aligned with his relatives. *New Silver Palace Restaurant*, 334 NLRB 290, 302 (2001), also involved an unfair labor practice proceeding wherein the issue was whether an individual's discharge was not violative of the Act because the individual was not an employee within the meaning of the Act because his brother-in-law was a 33% shareholder of the employer. In *New Silver Palace Restaurant* there was no showing that the individual's community of interest was aligned with his brother-in-law, his termination suggested that his interests were not so aligned, and there was no evidence that family members held a combined majority ownership position. In *Blue Star Ready-Mix Concrete Company*, 305 NLRB 429, 430-431 (1991) the issue involved the employee status of an individual who was the grandson and nephew of two corporate owners, but there was no evidence that the individual's parent was a corporate shareholder, that the individual was supervised by his parent, or that his interests were otherwise aligned with management.

Based on consideration of the factors set forth in the *Caravelle Wood Products* test discussed above, I conclude that the evidence establishes that Kyle Morrissey's interests are more closely allied with those of management than with the interests of bargaining unit employees. In making this determination I note that Kyle's father is a substantial corporate shareholder; that his father and grandfather hold a combined 74 % ownership interest in the corporation; that his father and grandfather are actively engaged in management of the corporation; that his father is his direct supervisor; that his brother is a working foreman of operating engineers and sometimes fills in for the father in directing the work of the sewer crews that Kyle works on; and there are a relatively large number of family members employed by the Employer compared to the number of non-family member employees. Thus, Kyle Morrissey's interests as a member of the governing family of the corporation, as well as his access to management, gives him a status and community of interest allied with management rather than with other employees. *Parisoff Drive-In Market, Inc.*, and, *NLRB v.*

Caravelle Wood Products, Inc., supra. Although the record did not specifically address Paul Morrissey's status, I find that the considerations discussed above regarding Kyle Morrissey are equally applicable to Paul Morrissey. Accordingly, Kyle Morrissey and Paul Morrissey shall be excluded from the bargaining unit.